Supreme Court, U.S.
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No. :_____

In the

Supreme Court of the United States

October Term, 2000

ROGER BRUCE FEINMAN,

Petitioner,

v.

THE COMMITTEE ON GRIEVANCES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Petition presents a question of constitutional law that the courts below wished not to confront, albeit Petitioner properly preserved it. Besides refusing to take cognizance of the issue, the Circuit Court of Appeals tried to block its consideration by this Court so as to protect and preserve acts already done. For the Judicial Council of the Second Circuit has fastened upon a new and fearful technique to evade the requisites of contempt, Rule 11 and 28 U.S.C. § 1927, and to shunt issues of judicial disqualification to a disciplinary hearing panel of hand-picked attorneys in private practice, where, under the foreboding clouds of judicial wrath and conflict of interest, controversy may be allayed. Because of its potency; the likelihood that this fundamentally unfair technique will recur and spread; its incongruity with due process; its affront to separation of powers and Congress's "power of the purse"; and the departure by the courts below from the accepted and usual course of judicial proceedings, Petitioner asks:

When a district court, upon the complaint of a member judge against an attorney who has litigated before him, undertakes a disciplinary grievance action against the attorney after the litigation has terminated, in the absence of Congressional authorization or the attorney's consent does the court's appointment of lawyers from private practice having active matters before the court to comprise a hearing panel, to take evidence, and report their findings of fact, conclusions of law, and recommendations for sanction, violate either the Appointments Clause (Article II, Sec. 2, Cl. 2) or Article III of the U.S. Constitution?

PARTIES TO THE PROCEEDING

All of the parties below are listed in the caption. Petitioner *pro se* Roger Bruce Feinman is a resident and domiciliary of New York, formerly an Attorney and Counselor at Law admitted to practice in the courts of New York State, the United States Court of Appeals for the Second Circuit, the United States District Court for the Eastern District of New York, and the United States District Court for the Southern District of New York. He is not, nor has he ever been, admitted to this Court's Bar. He has argued appeals as counsel of record in the United States Court of Appeals for the Second Circuit, the New York Court of Appeals, and the New York State Supreme Court Appellate Divisions, First and Second Departments. He is not incorporated.

The Committee on Grievances of the United States District Court for the Eastern District of New York is an unincorporated entity established by local rule of that court and composed of certain of its judges. Both they and the Solicitor General of the United States shall be served with the requisite copies of this Petition.

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OPINIONS AND ORDERS BELOW

The amended Opinion and Order of the Court of Appeals is published at 239 F.3d 498. Its Order denying Petitioner's Petition for a Rehearing *sub. nom.* "In re: Roger B. Feinman" is unpublished. The Court of Appeals annexed to its Opinion the full text of the unpublished Memorandum Decision and Order of the United States District Court for the Eastern District of New York. Not mentioned or included in the Court of Appeals Opinion is the Eastern District's Order denying Petitioner's motion for a vacatur.

JURISDICTION

The Opinion and Order of the Court of Appeals was entered February 8, 2001. Its Order denying a rehearing was entered March 26, 2001. This Court's jurisdiction to review on a writ of certiorari is premised upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES

The Appointments Clause (Article II, Sec. 2, Cl. 2) states:

> "[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Article III, cl.1 of the Constitution reads:

> The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Former Local General Rule 4 of the United States District Courts for the Southern and Eastern Districts of New York is contained in the Appendix section.

STATEMENT OF THE CASE

Roger Bruce Feinman petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit, which affirmed the order of the United States District Court for the Eastern District of New York disbarring him from the practice of law before that court. Jurisdiction in the district court was presumably premised upon its inherent authority to discipline members of its bar. Jurisdiction in the Court of Appeals was grounded on 28 U.S.C. § 1291. Except for minor quibbles not germane to the issue at hand, Petitioner does not dispute the statement of facts by the United States District Court for the Eastern District of New York. However, both courts below failed to adequately supply context.

The Regulatory Backdrop

Professional misconduct by a lawyer admitted to practice in New York State invites disciplinary action by the legisla-

tively sanctioned [1] authorities in one of four judicial departments. For example, in the First Department the relevant body is the Departmental Disciplinary Committee whose members are appointed by the Appellate Division of the Supreme Court. In the Second Department, there are three judicially appointed "Grievance Committees" whose jurisdiction is defined according to judicial districts.

Unlike the state system, there are disciplinary mechanisms in each of New York's United States District Courts by dint of local judicial rules to the extent that they are authorized by 28 U.S.C. § 2071 and Rule 83(a) of the Federal Rules of Civil Procedure, and consistent with the Constitution of the United States. [2] Attorney discipline in the federal district courts for the Southern and Eastern Districts of New York is governed by one local rule common to the two districts. During the relevant period, September 1994 - February 1997, the operative provision was Local General Rule 4, which predated Petitioner's admission to practice in both these courts in 1983. Under a revision made effective April 15, 1997, the operative provision became and still is Local Civil Rule 1.5.[3] Pursuant to subsection (a) of the rule, the Southern District of New York established a committee on grievances composed of six active judges of the court who are appointed by the Chief Judge, one to serve as Chair. In addition, a standing panel of attorneys is maintained to investigate complaints and serve on hearing panels.

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[1] New York Judiciary Law, Art. 4, § 90)

[2] *See Theard v. United States*, 354 U.S. 278, 281 (1957) (recognizing inherent power of district courts to promulgate and enforce rules concerning disbarment of attorneys).

[3] Local General Rule 4 is set out in the Appendix. Because the successor rule is reproduced on the accompanying CD-ROM and also available from the Southern District Court's web site, it is not reproduced here.)

Typically, disciplinary matters in the Southern District number fewer than 100 each year, a small fraction of the volume of matters addressed by the state system. Instances of suspension or disbarment prior to 1994 occurred almost exclusively in reciprocal proceedings that had their origins in state court or foreign state bar association disciplinary actions. These types of cases still overwhelmingly predominate. Traditionally, Local General Rule 4 was applied to reciprocal disciplinary matters; judicial complaints against attorneys arising from their conduct in the Southern District court were usually referred to the disciplinary authorities of the state Supreme Court.

This case arises, however, from the more recent trend of keeping judicial complaints against attorneys "in house," applying the local disciplinary rule (Local General Rule 4 or its successor) in support of original disciplinary actions in the federal district courts. The trend of recent cases, all instigated by judicial complaints against attorneys in litigation, suggests that this option is invoked in situations that raise concern for vindicating the integrity of an individual district judge, so that referral to the well-articulated and carefully structured state court disciplinary system is somehow deemed now inappropriate.[4]

Underlying Litigation: Groden v. Random House, Inc., et. al.

On or about February 16, 1994, Petitioner instituted in the United States District Court for the Southern District of New

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[4] While under the state court system, an attorney who has been disciplined in a "foreign jurisdiction," which would include a federal district court, is entitled to a hearing, in a state reciprocal disciplinary case, the defenses open to him or her are limited. See, e.g., 22 N.Y.C.R.R.§ 603.3(c) (First Department) and §691.3 (Second Department).

York a civil action for monetary and injunctive relief on behalf of Robert J. Groden, then domiciled in Pennsylvania, against Random House, Inc., The New York Times, and Gerald Posner for commercial misappropriation of name and likeness under New York Civil Rights Law §§ 50-51, and violation of 15 U.S.C. § 1125(a)(1) ("the Lanham Act") in a nationwide print advertising campaign for the book, "Case Closed." There was *no* claim for common-law defamation.

Groden was assigned to a district judge, The Hon. John S. Martin, Jr. In lieu of answering the Complaint, defendants originally sought to move under Rule 12(b)(6) for dismissal upon the ground of failure to state a cause of action for which relief could be granted. Under Judge Martin's Individual Rules as then constituted, attorneys were prohibited from serving and filing motion papers without first requesting a conference with the court. His procedures required them to submit a bare Notice of Motion with such a request. Defendants submitted their bare Notice and requested a conference. April 26, 1994, an initial unrecorded conference was held in chambers. During the conversation, Judge Martin mentioned that he had attended law school with the defendants' lead counsel some 35 years earlier. Discussion of the defendants' motion ensued and the court set a schedule for the exchange of papers. The court directed Petitioner not to take any discovery during the pendency of defendants' motion. When the defendants served the final version of their motion, as opposed to the draft previously submitted to chambers, they styled it alternatively as seeking summary judgment, and explained in footnotes to both their moving papers and memorandum of law that the sole purpose of this styling was to attach certain published and undisputed documents to their moving affirmation. The alternative styling was technically superfluous but served to memorialize certain

understandings that had been arrived at during the chambers conference.[5] Petitioner contested the defendants' motion on behalf of his client, treating it as a 12(b)(6). Following oral argument and submission of the motion on June 24, 1994, defendants sought by letter to the court dated July 8 to raise a new and volatile issue, contending that Mr. Groden could not make out a case for false advertising unless he was prepared to prove that the major "lone gunman" thesis of "Case Closed" and its advertising campaign was false, in that President Kennedy had been assassinated as the result of a conspiracy. Absent such proof, the defendants argued, the advertising campaign ought to be taken by analogy to common law libel as unactionable opinion. On behalf of his client, Petitioner replied that the conspiracy issue was unnecessary to a disposition of the case, and he objected to its belated interposition by the defendants. Nonetheless, Petitioner stated that his client was prepared to meet the issue should the court wish to entertain it, and he offered to submit evidence in support of Mr. Groden's pro-conspiracy position so as to prove the advertising campaign false as a matter of ascertainable fact. The district court did not respond to this exchange other than to indicate to Peti-

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[5] Under both Local Civil Rule 3(g) then in effect[now known as Local Civil Rule 56.1], and Judge Martin's Individual Rules as then constituted, counsel seeking to make a summary judgment motion had to serve and file a separate and distinct "statement of the material facts as to which the moving party contends there is no genuine issue to be tried . . . followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e).". The absence of such a statement by defendants --- or, for that matter, of any competent, admissible evidence contained in their showing -- further assured Petitioner that he was not litigating summary judgment.

tioner telephonically through a secretary on July 13 that it would entertain no further submissions.

August 17, 1994, Petitioner served and filed an Amended Complaint for Mr. Groden, adding a new defendant and substantively incorporating into Mr. Groden's Lanham Act cause of action the assassination issue that had first been raised by the defendants.

On August 23, 1994, Judge Martin issued a Memorandum Opinion and Order granting summary judgment to defendants and dismissing Mr. Groden's Complaint with prejudice. The final Judgment specified that the court had elected to treat the defendants' motion as one for summary judgment "on its own initiative." There is no dispute that the court never notified Petitioner of its intention to so treat the motion prior to disposition. In his Opinion, Judge Martin relied heavily upon the last-minute argument raised by defendants in their letter brief, and he referred more than once to plaintiff Groden's failure to present countervailing evidence to show that the conspiracy/non-conspiracy issue could be determined within the context of a judicial proceeding. Neither the Memorandum Order nor the Judgment mentioned the Amended Complaint.

Defendants never moved against nor answered the Amended Complaint. Instead, following the district court's Order, defendants asked by informal letter that the court amend the Judgment to include dismissal of the Amended Complaint. By this time, Petitioner had learned of circumstances in Judge Martin's background that, combined with the disturbing manner of the court's summary disposition, gave him serious concerns. September 1, 1994, pursuant to the Federal Rules of Civil Procedure and Judge Martin's Individual Rules, Petitioner submitted a bare and unsupported Notice of an omnibus motion in Mr. Groden's case seeking renewal and reargument of the defendants' motion

and Judge Martin's recusal. Petitioner attached this Notice to a letter addressed to the court expressing shock over how the case had been handled. After submitting these materials, Petitioner received a telephone call from an attorney for Mark Lane, and learned for the first time that, prior to Groden's action, Lane had begun a parallel lawsuit common law libel against Random House in the District Court for the District of Columbia; that a motion by Random House for summary judgment was pending in that action; and that Random House had submitted to the D.C. court a copy of Judge Martin's heavily libel-oriented *Groden* decision. Having been deprived of any opportunity to assess the relationship and significance of Mr. Lane's case to Mr. Groden's, and out of concern for any prejudicial impact that a disposition in *Lane* might have upon Mr. Groden's eventual appeal, Petitioner wrote a letter addressed to the Hon. Royce C. Lamberth, who presided over *Lane*, with copies to all counsel and Judge Martin, to record the fact that he had been kept in the dark.

Although the opinions of the courts below do not reflect the fact, the record is clear and unambiguous that Judge Martin held no conference on Mr. Groden's motion, did not permit Petitioner to submit any supporting papers, did not require any response from defendants, and held no argument. September 23, 1994, Judge Martin issued a heated and caustic public censure of Petitioner, in a Memorandum Order denying Mr. Groden's motion outright and *sua sponte* dismissing his Amended Complaint. Therein, he also expressly adjudged Petitioner guilty of having violated the Code of Professional Responsibility. He further stated that he had referred his disciplinary charges to the Grievance Committee of the Southern District court and to the Disciplinary Committee of the New York State Supreme Court, Appellate Division, First Department, within which Peti-

tioner then maintained his office. In reality, Judge Martin never referred his grievance to the state court authorities. Although Local General Rule 4 required that grievance complaints be addressed to the Chief Judge in the first instance, Judge Martin instead sent an interoffice memorandum directly to each of his fellow judges sitting on the Grievance Committee. Finally, he ordered Petitioner to show cause why he should not be sanctioned pursuant to Rule 11 of the Federal Rules of Civil Procedure. After permitting Petitioner to be heard on the last point, an opportunity that Petitioner seized to submit to the record the evidence he would have submitted in opposition to summary judgment had he known the court's intentions, the judge declined to rule on his own Rule 11 accusation and instead referred it to his court's Grievance Committee. Thus, besides the prejudice to Petitioner's client, the ultimate outcome of Judge Martin's public remonstrations against Petitioner deprived him personally of any appealable order within the meaning of 28 U.S.C. § 1291.

In his September 23 Memorandum, Judge Martin divulged for the first time his relationship with the Assistant General Counsel for Random House who was supervising the defense of both *Groden* and *Lane*, and whom he had formerly employed in the U.S. Attorney's office for the Southern District of New York.[6] He asserted that this relationship was limited to meetings at occasional bar functions and staff reunions, but that his ancient law school acquaintance with the defendants' lead trial counsel, Victor Kovner, Esq., was "far more significant" to him.[7] As in the chambers confer-

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[6] She had attended counsel table at the oral argument of defendants' motion to dismiss Mr. Groden's complaint on June 24, 1994.

[7] Besides his leadership role in the First Amendment Bar, Mr. Kovner is commonly well-known as a close friend, political

ence of April 26, Judge Martin here made no mention that this acquaintance had endured through the ensuing years.[8] Petitioner again sought Judge Martin's disqualification by way of Motion dated October 21, 1994, which the judge denied by Memorandum Order dated December 2, 1994. Petitioner also unsuccessfully sought mandamus in the Second Circuit Court of Appeals. A complaint by Mr. Groden against Judge Martin to the Judicial Council for the Second Circuit was dismissed by Chief Judge Jon O. Newman, who also assigned himself to Mr. Groden's direct appeal from the district court.

According to a written statement of disciplinary charges later received by Petitioner and made part of the record of the subsequent disciplinary action, on October 5, 1994, the SDNY Grievance Committee appointed a member of its roster of disciplinary attorneys to prepare charges against the Petitioner. Petitioner did not learn of this appointment,

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associate , and former New York State re-election campaign chairman of former President William Jefferson Clinton.

[8] In his brief on behalf of his clients to the U.S. Court of Appeals for the Second Circuit, Victor Kovner, Esq. alleged, regarding his relationship with Judge Martin: "that relationship is confined to the fact that the two were law school classmates more than 30 years ago and have occasionally met during the intervening years at class reunions and bar association meetings." Brief of Defendants-Appellees Random House, Inc., The New York Times Company, The New York Times Sales, Inc. and Gerald Posner, *Groden v. Random House, Inc. et al.*, Second Circuit Court of Appeals Docket No. 94-9100, p. 11 at fn. 20. Subsequently, during that appeal, Petitioner learned through a professional contact that Martin and Kovner had together arranged to meet at the Federal Bar Council's Annual Law Day Dinner at the Waldorf-Astoria Hotel on May 1, 1994, while the parties were actively litigating the Groden case. Neither individual informed Petitioner of this *ex parte* contact.]

or any other information related to discipline, until after the *Groden* litigation had run its course.

On appeal, the Second Circuit court affirmed all orders made by Judge Martin in the Groden case.

The Original Disciplinary Action

September 29, 1995, the Chair of the SDNY Grievance Committee issued an Order appointing a panel of three lawyers in private practice to hear Judge Martin's charges against Petitioner and report their findings and recommendations. The Order related the Committee's conclusion "that the charges against the respondent require prosecution." Petitioner was not a recipient of this Order and had no knowledge of its existence until November 1996.

Petitioner received an Order to Show Cause dated October 20, 1994, from the Southern District court, ordering him to respond to Judge Martin's disciplinary charges before the panel of three attorneys. As had the Order that appointed the panel, this Order again contained the Grievance Committee's finding "that charges of professional misconduct made against respondent Roger Bruce Feinman require prosecution."

Petitioner submitted a voluminous response to the Order to Show Cause and its accompanying Statement of Charges. On its own motion and apparent authority, the panel then directed that the charges be amended to add provisions of the Code of Professional Responsibility other than those already cited in the instrument authorized by the Grievance Committee, and they directed Petitioner to answer the Amended Charges.

Under Local General Rule 4 all non-reciprocal cases appeared to require the convening of a hearing unless the respondent failed to answer the charges or his answer failed

to raise any issue of fact.[9] This is a salient feature of the Rule because the district court opinion under review in this Petition paradoxically claims that the role of attorney panelists is to merely "advise" and "assist" the Grievance Committee. The rule by its terms and application, on the other hand, did not invest the panel with the discretion *not* to prosecute, neither did it permit either them or a respondent attorney to waive a hearing, nor did it afford him any direct access to the district court during the panel process, no matter how prolongated. Also, the rule provided for the sanctions of public censure, suspension, or disbarment, but *not* for any lesser sanction such as a letter of reprimand or admonition. In general, therefore, the Committee's reference of a judge's grievance to a panel of lawyers implicitly signified that, if the panel found a respondent guilty as charged in whole or in part, it was without the discretion to recommend a non-punitive sanction. However, in the instant case, Petitioner had already been publicly censured by Judge Martin in his Memorandum Order dated September 23, 1994, within the *Groden* litigation. Thus, the reference to the panel in Petitioner's case obviously raised the bar of ostensible judicial expectation of the panel's performance.

While making a panel hearing, once ordered by the court, nonwaivable in original disciplinary matters, Local General Rule 4 did not provide a respondent attorney with any means of access to third-party evidence beyond his control. There was no subpoena power. Also, there is no mention in Local General Rule 4 (or its successor) of precisely how the hearing is to be conducted, that apparently being left to the discretion of the panel. After responding to the Order to

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[9] The rule is interpreted otherwise where reciprocal proceedings are concerned. *See Matter of Jacobs*, 44 F.3d 84 (2d Cir. 1994); *In re Friedman*, 51 F.3d 20, 22 (2d Cir. 1995).

Show Cause, Petitioner asked the panel in writing for guidance as to the procedures it intended to use. He also asked whether they or their firms currently had any cases pending before Judge Martin or any member of the Grievance Committee. (Panel 17). The panel chair's response on both scores was evasive, but his reply to the second question merits quotation in full:

> "Like all New York City law firms with substantial federal litigation practices, both Mr. Levine's firm and my firm from time to time represent clients in litigations assigned to Judge Martin and members of the Grievance Committee of the Southern District of New York. Likewise, as would be the case with any other significant business headquartered in New York, Ms. Schonfeld's company and/or its affiliates may have been, may currently be, or may in the future be involved in litigated matters assigned to Judge Martin or members of the Grievance Committee." (Panel 18)

Respondent attempted to challenge the propriety of the panel's amendments by way of motion to the Grievance Committee. The court ignored the motion. He also unsuccessfully sought pre-hearing discovery, which was not permitted by Local General Rule 4.

Interposing a lengthy formal Answer to the Amended Statement of Charges, Petitioner raised both structural and due process constitutional objections to the appointment of the hearing panel and the vagueness of Rule 4. His Second Affirmative Defense read in full:

> "The jurisdiction and adjudicatory powers of the United States District District Court for the Southern District of New York, as con-

> ferred by Article III of the Constitution of the United States, the statutes, and the laws arising thereunder, belong solely to the judicial branch of government, and they may not be delegated to a panel or committee of attorneys in private practice without the authorization of Congress." (JA 11)

Immediately after serving that Answer, Petitioner informed the panel and the Grievance Committee in writing that he would stand on his constitutional objections and participate no further in the panel phase of the proceeding, refusing to accept any further correspondence from the panel.[10]

Following his declared refusal to have anything further to do with the panel phase of the matter, Respondent rejected any and all correspondence from either the panel or committee counsel unopened, and in each instance he re-

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[10] Petitioner was permitted by Rule 3.4(c) of the ABA Model Rules of Professional Conduct, which Local General Rule 4 incorporated by reference, to raise a good-faith and colorable objection to the constitutionality of delegating evidence-gathering and fact-finding functions to a nonjudicial hearing panel. The Rule states: "A lawyer shall not:

. . .

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; . . . .'

American Bar Association Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct*, 3d ed. (1996) at 325. The drafters' official comments to the ABA Rules unequivocally indicate that a lawyer may in good faith challenge the validity, scope, meaning or application of legal regulations of the practice of law without being held guilty of a failure to cooperate with disciplinary authorities. *Id.* at 15, 532-33, 559.

corded those rejections in letters to the panel and/or the Grievance Committee chair.

Simultaneously, without the prior consent of the panel, committee counsel attempted unsuccessfully to serve Petitioner with a Second Amended Statement of Charges containing additional allegations of misconduct pertaining to the *Groden* case. On behalf of the Grievance Committee, he represented to the panel that this new set of charges had actually been served upon Petitioner by express mail, and the panel proceeded to determine the charges on that basis. Soon after the panel hearing, held in a courtroom at the United States Courthouse made available to them for that purpose, committee counsel conveyed in writing to the hearing panel the Grievance Committee's recommendation that Petitioner be disbarred. He then withdrew from the matter to become a law partner of the hearing panel's Chair.

September 16, 1996, the panel rendered a Report of its findings and recommendations to the Grievance Committee. The panel completely acquitted Petitioner of two of Judge Martin's original complaints concerning the disqualification motion in *Groden*, but in upholding the remainder recommended that Petitioner be disbarred. As a circumstance in aggravation of the sanction, the panel emphasized the alleged fact that Petitioner had actually received service of the Second Amended Statement of Charges but knowingly and wilfully refused to answer it. The Grievance Committee incorporated the panel report by reference into an Order dated November 4, 1996, disbarring Petitioner from the Southern District court. On motion by the Petitioner, the Order was vacated, and he was permitted to submit an extensive reply to the report, which amplified his structural objections to the constitutionality of the hearing panel device, whereupon the Grievance Committee issued an Order

dated February 11, 1997, striking his name from the roll of attorneys.

First Appeal to Second Circuit

On direct appeal to the Second Circuit, Petitioner first moved for summary reversal on the basis of the Affirmative Defense previously quoted. The court denied the motion without opinion. Petitioner then sought leave to file an oversized appellate brief. Such leave was denied, and Petitioner was restricted to the court's then standard limitation of 50 pages, more than half of which was necessarily consumed by a discussion of the facts of both the *Groden* litigation and the ensuing disciplinary proceeding. Still, Petitioner extensively briefed his Article III objection to the hearing panel. *Petitioner neither raised nor briefed the Appointments Clause issue during that original direct appeal.* Since the SDNY Grievance Committee was permitted to file its appellee brief one week before oral argument, and Petitioner did not receive that brief until five days before the argument, Petitioner was not afforded the time under the rules to prepare and file a reply brief. In a concise unpublished Summary Order that did not address the chief concerns raised by Petitioner in brief, the Second Circuit affirmed the Grievance Committee's final order. *In re Feinman*, No. 97-6064, 1998 U.S. App. LEXIS 18801, 1998 WL 537825 (2d Cir. July 23, 1998).

It is clear that the Court of Appeals did not take cognizance of Petitioner's Article III issue. The Court addressed the appointment of a non-judicial panel only in terms of its being authorized by Local General Rule 4, and whether the appointment satisfied the Due Process Clause:

> "The appointment and use of an advisory panel of attorneys is clearly authorized by the Southern District's Local Rules, both as then

> in effect (as Rule 4(a)) and as currently in effect (as Rule 1.5(a)), and does not violate the requirements of due process."

In re Feinman, supra[11] The proper exercise of Article III power and due process are related but conceptually separate and distinct concepts. The question is whether the Constitution sets limits on the federal courts' power to act in such a way that the appointment of these non-judicial panels is unlawful. If so, then the Southern District court's employment of such a panel was a nullity, regardless of the fairness of the procedures used to implement the panel proceedings.

Subsequent Reciprocal Discipline

Shortly thereafter, in a reciprocal disciplinary proceeding, Petitioner was disbarred by his initial licensing authority, the Supreme Court of the State of New York, Appellate Division, Second Department. On the basis of that reciprocal discipline, the Second Circuit Court of Appeals then disbarred the Petitioner. From his perspective, however, there was an indispensable item of evidence missing from his case file -- an item he could not obtain until the final reciprocal disciplinary proceeding against him took wing.

Following the Second Circuit's affirmance, the District Court for the Eastern District of New York, which had in-

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[11] Of special interest is the Circuit Court's characterization of the issue subject to its holding: "On appeal, he contends principally that (1) the Committee violated his right to due process by appointing a panel of attorneys admitted to practice before the district court to assist in fact-finding , , ," On the basis of this Summary Order, the Circuit Court would later attempt to claim, in the Opinion and Order now under review, that it had disposed of Petitioner's structural constitutional objections to the convocation of a lawyer hearing panel.

formally stayed its reciprocal disciplinary proceeding at Petitioner's request, reactivated that proceeding and ordered him on December 3, 1998, to show cause why discipline should not be imposed. After responding on January 29, 1999, and raising the same structural objections he had raised to no effect in all prior proceedings, Petitioner moved the court on April 26, 1999, for a judicial subpoena *duces tecum* to obtain third-party records pertaining to the alleged service of the Second Amended Statement of Charges in the SDNY's original disciplinary action.[12] The record fails to disclose any disposition of Petitioner's motion by the Eastern District court. Taking advantage of the fact that this was docketed as a normal civil action, and that he was still an attorney in the Eastern District court, Petitioner issued his own subpoena for business records from the Memphis headquarters of Federal Express Corporation. These records were produced and proved that the overnight package bearing the Second Amended Statement of Charges that the Southern District's committee counsel claimed to have served had actually been returned to counsel undelivered. Although Petitioner immediately sent this information to the Eastern District Grievance Committee by overnight courier on May 11, 1999, the court ignored the submission, and on March 27, 2000, filed an Opinion and Order dated March 18, denying him a hearing and disbarring him from practice. The district court's relevant holding reads as follows:

> "The panel did not perform any 'adjudicative functions.' Instead, it was the role of the panel to 'advise the committee whether prosecution of a federal disciplinary action is required' and to issue a report and recommendation to the grievance committee. [cita-

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[12] Unlike former Local General Rule 4, Local Civil Rule 1.5 provided the possibility for limited third-party discovery.

> tion omitted] It is the ultimate responsibility of the grievance committee, after conducting a hearing, if necessary, to arrive at a final determination."

April 6, 2000, Petitioner moved pursuant to F.R.Civ.P. Rules 59(a)(2), 60(b)(1) and 60(b)(2) for a vacatur. Besides resubmitting the Federal Express evidence, Petitioner there raised for the first time an additional structural argument based on the Appointments Clause as to why the appointment of a lawyer hearing panel in the original proceeding had been structurally improper. In denying the motion by Order dated April 24, 2000, the Eastern District court did not address this argument.

Second Appeal to Second Circuit

On appeal from *both* of the Eastern District's Orders to the Second Circuit, Petitioner again raised and briefed the Appointments Clause issue, together with the Article III arguments that he had previously posed, but which the same court had never answered. Here the Court of Appeals *sua sponte* raised a collateral estoppel defense and resorted to verbal legerdemain, asserting without any basis in the rec??ord that it had previously ruled on both these issues, and that Petitioner was barred from raising them again.[13] Strangely, the Circuit Court extensively discussed Petitioner's due process notice issue, which he does not press on this Petition for reasons of length. Nonetheless, readers of the Circuit Court's opinion in this matter dated February 8,

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[13] Four judges of the Eastern District court, aware of the prior appeal from the original disciplinary proceeding and its outcome, addressed the Article III issue in substantive terms.

2001,[14] annexed hereto, may have extreme difficulty understanding how the outcome of a prior appeal precluded Petitioner from presenting one issue in this appeal, but not the other issue. More amazingly, however, *the Second Circuit completely overlooked and failed to dispose of one-half of Petitioner's appeal, i.e., the Order of the Eastern District court dated April 24, 2000, denying his Motion for a Vacatur of the March 18, 2000 disbarment order.*

Petitioner timely sought a rehearing in the Second Circuit, which was denied without opinion.

In the 7 years between the date he filed Robert Groden's Complaint and the Second Circuit' denial of his Petition for a Rehearing in this case, Petitioner never enjoyed an evidentiary hearing before a judge or a magistrate judge.

REASONS FOR ALLOWANCE OF THE WRIT

The Question Presented affects practice in many of the district courts nationwide and transcends the facts of this case, so that a nationally binding rule of law is imperative. If it can be agreed that the imposition of disciplinary sanctions itself implicates the basic responsibility of a district court to supervise its bar, then it must be exercised not as an expedient to avoid adjudicating the proceedings before the court, or to salve the dignity of a particular judge, but with care to avoid the structural licentiousness that may undermine the integrity of both the court and its disciplinary process.

I. The Inherent Power to Discipline Does Not Embrace the Creation of Lawyer Hearing Panels

Petitioner does not dispute that a federal district court possesses inherent power to discipline members of its bar.

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[14] *Committee on Grievances of the United States Dist. Ct. for the Eastern Dist. of New York v. Feinman*, No. 00-6900, 2001 U.S. App. LEXIS 2154 (2d Cir. February 8, 2001)

The contemporary source of this authority appears to be, not the Constitution, but 28 U.S.C. §§ 1654, 2071, the appearance and rule-making statutes respectively. *See also, Matter of Calvo*, 88 F.3d 962, 964-66 (1st Cir. 1996)(holding disbarment is a case or controversy, hence a judicial act).

The inherent power to discipline members of the bar is not unlimited, however, but is confined to what is necessary and indispensable to the exercise of the judicial function. *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991); *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987). Obviously, without the institution of hearing panels, the federal courts would retain their inherent power to determine membership of their bar, to prescribe rules governing their conduct, and to impose disciplinary sanctions for violations of those rules. Just as clearly, the delegation of fact-finding functions in original disciplinary proceedings to a panel of lawyers is not an essential attribute of a federal court's inherent power to impose discipline, and so cannot survive without express congressional authorization for the delegation.

Local General Rule 4(k) provides its own evidence that delegation to a hearing panel composed of lawyer adjuncts is not a necessary or indispensable incident to the exercise of inherent disciplinary power:

> "(k) Misconduct of any attorney in the presence of this court or in any matter in respect to any matter pending in this court may be dealt with directly by the judge in charge of the matter or at said judge's option referred to the committee on grievances, or both."

II. Federal District Courts lack jurisdiction to create hearing panels of private attorneys actively practicing before them to perform adjudicative func-

tions in an original disciplinary proceeding against another attorney without his waiver or consent.

Judicial power is reserved for Article III courts. Article III requires that the judicial power of the United States be exercised by federal judges appointed for life tenure and protected from diminished compensation. Moreover, Federal courts are courts of limited jurisdiction, empowered to act only within the bounds of Article III of the United States Constitution and statutes enacted by Congress. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-80 (1803).

However, the institution of a hearing panel - no less a panel composed of active members of the federal court's bar - under the former Local General Rule 4 was not created by Congress and is not an Article I court; and there is no authorization in the Constitution or in any statute for an Article III court to assign to a committee of private attorneys the fact-finding and quasi-adjudicative functions historically performed by judges. Absent the express authorization of Congress, such a delegation or referral as occurred in this matter is not permitted under Article III.

For that matter, Congress itself may not assign traditionally judicial power to adjuncts engaged in the adjudication of rights not created by Congress. The right or privilege of an attorney to practice law before the court derives from a right created, protected, and regulated by state law. Also, by the explicit terms of former Local General Rule 4, the issues sought to be resolved did not arise out of federal law, but out of the attorney disciplinary rules as embodied by state law. It is therefore submitted that these may only be adjudicated, within the federal system, by an Article III court. Cf, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 40,94 (1982) (White, J., dissenting).

Article III protects two distinct interests: structural (the need and desire for an independent judiciary) and personal (the right to have claims decided by Article III judges who are free from potential domination by virtue of its tenure and salary provisions). *See, Commodity Trading Comm n v. Schor*, 478 U.S. 833, 848 (1986).

One of the primary purposes of Article III was to insulate judges from pressure by other judges. *Northern Pipeline Constr. Co.*, 458 U.S. at 40, 57-60 & n. 10; *The Federalist No.78* (Alexander Hamilton). A judge must be free to decide a case according to the law as he sees it, without personal repercussion or retaliation from any source. An inherent conflict of interest confronts hearing panel members, who might be compelled to choose between what they think is right and the result they think will please the court. The panelists are unprotected by the same or similar safeguards that assure the independence of the federal judiciary. Judicial independence is not preserved by making one group of apprentice judges beholden to another group of (Article III) judges, including the complaining judge.

Any power delegated to the court is necessarily a subordinate power, limited by the terms of the delegating statute (or constitution). There is no limitation expressed in former Local General Rule 4, neither does it prescribe any standards governing the delegation of power to a hearing panel, nor any procedures for it to follow, nor for that matter any standards for the court's review of its conduct, findings or recommendations. *Cf, Northern Pipeline Constr. Co.*, 458 U.S. at 115 (White, J., dissenting).

Two of the basic questions here are, when the court assigns the hearing and determination, or fact-finding functions in an original disciplinary matter to an adjunct tribunal, to what extent are the essential attributes of judicial power reserved to the Article III court; and to what extent

does the non-Article III panel exercise the range of powers normally vested in the court? Local General Rule 4 was inscrutably vague and indefinite. Unquestionably, however, the panel's role is "judicial" in nature:

(1) They preside over an adversarial process in which the complainant and the Committee on Grievances are represented by counsel;

(2) They decide or resolve a dispute between opposing interests;

(3) They apparently have the power and discretion to amend disciplinary charges that originated with the Committee on Grievances;

(4) They apparently have the power and discretion to determine the procedural incidents of their hearings, i.e., what body of procedures they will follow, whether they will pick and choose an amalgam of procedures from various sources, or whether they will invent their own;

(5) They "adjudicate," i.e., they decide case-dispositive facts; they interpret, declare and apply a rule of law to those facts, and thus arrive at a decision relating to the acts of persons amendable thereto. In doing so, they exercise independent judgment and discretion;

(6) Although neither binding nor conclusive, their determinations affect property or other rights;

(7) Their power is coercive in that they can use the threat of punishment to compel obedience.

(8) They have the power to impede a respondent's liberty for a protracted period, by compelling him without recourse to expend significant amounts of time answering repetitive, cumulative, or expanded statements of charges, effectively holding his legal career under a cloud of uncertainty for as long as they desire.

They are the real judges, and to claim that they merely "advise" or "assist" is incompatible with any implication

that Congress has provided such panels the authority to actually try disciplinary cases. Indeed, the panel's authority has no inherent source. *See, Middlesex County Ethics Comm. V. Garden State Bar Ass'n,* , 457 U.S. 423 (1982) (holding state bar disciplinary proceedings judicial in nature where local attorney ethics committees act as an arm of the state supreme court in performing the function of receiving and investigating complaints and holding hearings).

In view of the functions that the panel actually performs, therefore, it has real and frightening power. Former Local General Rule 4 provided neither discernible standards setting bounds to that power and governing its exercise, nor procedural safeguards to limit the discretion of the panel and prevent abuse. The rule was therefore an unconstitutional delegation. Alleged judicial supervision and control over the proceeding is meaningless unless the respondent has access to make motions to the court, and to forfend the clear prejudice of having to endure a year or more of wrangling with a lawyer hearing panel.

It is true that Rule 4 implicitly empowers the Committee on Grievances to choose whether to follow the panel's report and recommendation or reject it entirely. Under pre-*Northern Pipeline Constr. Co.* constitutional standards, fact-finding and the rendering of preliminary conclusions of law by non-Article III judicial officers were permissible so long as the ultimate decision in the case was made by a judicial officer cloaked by the protections of Article III. *Growell v. Benson,* 285 U.S. 22 (1932); *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38 (1936). This implied that, at a bare minimum, a respondent-attorney in a disciplinary proceeding originating with the district court should be entitled to *de novo* review by that or a higher court. Nothing in Local General Rule 4, Second Circuit precedent, or general custom

among the states is contrary. *See,* Charles Wolfram, *Modern Legal Ethics* (1986), § 3.4.5, n.53 and cases cited therein.

It is a strange notion, however, that *de novo* review may somehow suffice to cure a jurisdictional defect. Moreover, in the absence of clearly defined procedures for hearing panels, *de novo* review by a district judge can never be effective. It has been held that access to review by the district court or appellate review by an Article III judge does not provide sufficient protection to satisfy Article III requirements. *Northern Pipeline Constr. Co., supra,* 458 U.S. 40 (1982); *Glidden Co. v. Zdanok,* 370 U.S. 530 (1962). An Article III judge, for example, is unable to make credibility assessments. Although witnesses were not heard by the panel during the original disciplinary action in the United States District Court for the Southern District of New York, Petitioner nevertheless has standing to object on these grounds because the panel proposed to penalize him for failing to appear and testify. This is a violation of his Fifth Amendment and Article III rights, because a judge should be required to hear his testimony, also the testimony of any other witnesses. "The one who decides must hear." *Morgan v. United States,* 298 U.S. 468, 481 (1936). Under the regime of Local General Rule 4, only the panel "hears", but the district court is permitted to "decide" by reviewing the record compiled before the panel and making a final determination. "[T]he exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level." *Northern Pipeline Constr. Co.,* 458 U.S. at 86 n-39 (Brennan, J., plurality opinion). In *Gomez v. United States,* 490 U.S. 858 (1989) this Court held that an Article III court may not delegate a "critical stage" of litigation traditionally within the judicial function to a magistrate. The Court re-

emphasized its doubts that a district judge could engage in meaningful review solely on the basis of a transcript. *Peretz v. United States*, 501 U.S. 923 (1991) modified Gomez only to the extent that the constitutional infirmity might be overcome by the parties' express consent. Here, four of the original disciplinary charges, whose scope incrementally expanded over time, derived from Judge Martin's public censure of Petitioner in a Memorandum Order dated September 23, 1994, which pre-empted Petitioner from litigating his client's motion for post-judgment relief and disqualification. Essentially, the disciplinary proceeding was a thinly-disguised severance from that litigation of the reargument and disqualification issues upon which Judge Martin never at any point permitted the Petitioner to be heard in behalf of Robert Groden, so that a full record could not be developed for effective and meaningful appellate review, and so that the actual "litigation" of those issues would be delegated to a collateral disciplinary matter under discreet and procedurally more constricting circumstances. Thus, neither Groden by his attorney, nor his attorney as a disciplinary target, was ever afforded a full and fair opportunity to litigate any of the issues they had raised at a "critical stage" of the civil litigation. This point is underscored by Judge Martin's reconsideration of his declared intention to prefer charges against the Respondent in the Appellate Division, First Department, of the New York State Supreme Court, where pre-hearing subpoenas and depositions would have been available, 22 N.Y.C.R.R. §603.5, possibly even in time to augment the *Groden* record-on-appeal in the Second Circuit. Martin continued to preside over post-judgment proceedings, which extended to a period of five months, while secretly harboring the grievances he had filed with SDNY Grievance Committee. Every additional charge against Petitioner that was not

mentioned in Martin's September 23, 1994 Memorandum related to the increasing friction between court and counsel during this period, and the record fairly suggests that both the judge and his friends in the defense camp did everything within their power to aggravate that tension as Petitioner struggled to safeguard his client's procedural rights.

This is not a case such as *United States v. Raddatz*, 447 U.S. 667, 669 (1980), where the interests at stake in the adjunct (suppression) hearing were of a lesser magnitude than those of the Article III (criminal trial) proceeding itself. Neither does the hearing panel apparatus deal with collateral issues, such as class certification, pretrial discovery, or monitoring the implementation of a remedy. The panel is asked to make the fundamental determination of liability and penalty for alleged violations of disciplinary rules. This goes beyond mere advice or assistance to the court and embraces the Article III judicial function. Here the interests of both the panel and district court levels are co-extensive.

For cases applying a similar analysis to the appointment of special masters, *see, LaBuy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957); *United States v. Microsoft Corp.*, 147 F. 3d 935 (D.C. Cir. 1998); *In re Bituminous Coal Operators' Ass n, Inc.*, 949 F.2d 1165, 1168 (D.C. Cir. 1991); *Stauble v. Warrob, Inc.*, 977 F.2d 690, 695-98 (1st Cir. 1992), and cases cited therein; and *Prudential Ins. Co. of Am. v. United States Gypsum Co.*, 991 F.2d 1080, 1085-87 (3d Cir. 1993).

III. Without a Congressional Vesting of the Appointment Power in the Federal Courts, the Appointment of the Lawyer Hearing Panel Ran Afoul of the Appointments Clause.

The creation of these attorney hearing panels in original disciplinary proceedings also violates the Appointments

Clause of the Constitution, Art II, 6 2, cl 2. It is not a small step inside the sphere of the Congress that summons this Court to assert its supervisory role and demands its intervention, but a wrongful encroachment that should be condemned.

By their station and conduct, and by the impicit terms of the Eastern District Court's own chief argument for saving the hearing panel device under Article III, the lawyer panelists were "inferior officers" for purposes of the Appointments Clause. *See, Freytag v. Commissioner*, 501 US 868, 881 (1991) (rejecting Tax Commissioner's argument that, by taking evidence, conducting trials, and preparing the proposed findings and opinion, special trial judges only advise and assist the Tax Court judge responsible for deciding a case, since they cannot issue final decision, therefore not "inferior officers" but "lesser functionaries" or employees. *Held*: A special trial judge is an "inferior Offlce[r]" whose appointment must conform to the Appointments Clause.); *Morrison v. Olson*, 487 U.S. 654 (1988).

There is no evidence of congressional intent to authorize these lawyer hearing panels. Congress has not authorized their appointment by statute, neither has it appropriated monies for their procurement. These panels are an unauthorized augmentation of Congressional appropriations, regardless of whether or not they receive compensation from the court for their services. or merely reimbursement for expenses. Assuming that they serve without compensation while continuing to receive their usual compensation from their law firms, there is a conflict of interest where their firms, who represent clients and matters before the court, stand to benefit from performing such services. The disciplinary mechanism does not preclude any lawyer who is before the complaining judge from serving on the panel,

and the panel in this case was evasive about that point when the Petitioner inquired.

CONCLUSION

The use by the United States District Court for the Southern District of New York of a lawyer hearing panel to determine the grievances of one of its judges against the Petitioner arising from his representation of Robert J. Groden in a civil matter was unauthorized by Congress and contrary to both the Appointments Clause (Article II, Sec. 2, Cl. 2) and Article III of the Constitution. The order of that court adopting and incorporating the panel's Report as the basis for disbarring Petitioner should be deemed an invalid basis for the imposition of reciprocal discipline in the United States District Court for the Eastern District of New York.

WHEREFORE, the Petitioner respectfully prays that this Petition for a Writ of Certiorari be granted, and that the Court of Appeals' Order affirming the Eastern District's Order be reversed, or for such other and further relief as to this Honorable Court may seem just, proper, and equitable.

Respectfully submitted,

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239 F.3d 498

COMMITTEE ON GRIEVANCES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, Petitioner-Appellee, v. ROGER BRUCE FEINMAN, Respondent-Appellant.

Docket No. 00-6900

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

239 F.3d 498

December 4, 2000, Argued

February 8, 2001, Decided

As Amended February 28, 2001.

Before: WALKER, Chief Judge, CABRANES, and STRAUB, Circuit Judges.

Roger Bruce Feinman appeals from a March 27, 2000 order of the United States District Court for the Eastern District of New York (Charles P. Sifton, Chief Judge and Chairman of the Committee on Grievances of the United States District Court for the Eastern District of New York ("the Committee")) disbarring him from practice before that Court. On appeal, Feinman argues, inter alia, that the disbarment order was entered in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution because he did not receive actual notice of the charges lodged against him by the Committee. We hold, in-

ter alia, that a party's constitutional right to receive actual notice of certain claims against him is not violated when he has himself intentionally and successfully thwarted service of the very notice that he claims not to have received.

Affirmed.

ROGER BRUCE FEINMAN, *pro se*, Briarwood, New York, for Respondent-Appellant.

Per Curiam:

Roger Bruce Feinman appeals from a March 27, 2000 order ("the March 27 order") of the United States District Court for the Eastern District of New York (Charles P. Sifton, Chief Judge and Chairman of the Committee on Grievances of the United States District Court for the Eastern District of New York ("the Committee")) disbarring him from practice before that Court. The March 27 order was a "reciprocal discipline" order[1] based entirely on an order of disbarment previously entered by the United States District Court for the Southern District of New York ("the Southern District order"); the Southern District order was affirmed by this Court on July 23, 1998. See In re Feinman, No. 97-6064, 1998 WL 537825 (2d Cir. July 23, 1998). For the reasons stated below, the March 27 order is affirmed.

On appeal, Feinman advances two colorable arguments. First, he contends that issuance of the March 27 order violated the United States Constitution because it was based on

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[1] As we have recently explained, "reciprocal discipline" is "disbarment or suspension summarily imposed [by one court] after some other court has taken such action based on a plenary inquiry." *In re Edelstein*, 214 F.3d 127, 128 (2d Cir. 2000).

the Southern District order, which in turn was based in part on factual findings made by non-judicial officers. However, Feinman raised this argument on his prior appeal to this Court, and we reached and rejected it. *See In re Feinman*, 1998 WL 537825, at *1. Accordingly, he is barred from pressing it again here. *See, e.g., Metromedia Co. v. Fugazy*, 983 F.2d 350, 365 (2d Cir. 1992) (noting that collateral estoppel "bars a party from relitigating in a second proceeding an issue of fact or law that was litigated and actually decided in a prior proceeding").

Second, Feinman argues that his disbarment in the Eastern District of New York violated the Due Process Clause of the Fifth Amendment to the United States Constitution because he was not provided with actual notice that amended disciplinary charges had been lodged against him. This argument is sheer casuistry. Feinman sent a letter to the Committee stating that he would accept no further correspondence from it. True to his word, Feinman then refused to take delivery of a Federal Express envelope conveying an amended complaint that listed the charges against him. In light of these facts, the District Court observed that Feinman's actual notice claim "borders on the frivolous." District Court Memorandum and Order at 13 (attached as Appendix). We agree, and hold that a party's constitutional right to receive actual notice of certain claims against him is not violated when he has himself intentionally and successfully thwarted service of the very notice that he claims not to have received. *See, e.g., Reliance Ins. Co. v. Mast Constr. Co.*, 159 F.3d 1311, 1318 (10th Cir. 1998) ("It is well-settled that the effect of a written notice cannot be avoided by refusing service of that notice.") (collecting cases); *Franklin v. Aycock*, 795 F.2d 1253, 1263 n.8 (6th Cir. 1986). *See also Patmon & Young Prof'l Corp. v. Comm'r*, 55 F.3d 216, 218 (6th Cir. 1995)

(holding that actual notice requirement for tax deficiency assessment is satisfied by a party's refusal of certified mail on the ground that "a taxpayer should not be allowed to defeat actual notice by deliberately refusing delivery of the IRS's deficiency notice"); *Erhard v. Comm'r*, 87 F.3d 273, 274-75 (9th Cir. 1996) (same). *See generally Cherry v. Heffernan*, 132 Fla. 386, 182 So. 427, 429 (Fla. 1938) (stating that if a party "chooses to flout the notice and refuse to accept it, he will not be permitted to say in the next breath that he has not been served").

We have considered Feinman's remaining arguments, and conclude that they are without merit.

Accordingly, the March 27 order is AFFIRMED.

APPENDIX to Opinion 00-6900

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

CV-96-5796 (CPS)

In the Matter of Roger Bruce Feinman, Esq., an Attorney and Counselor-at-Law. Respondent.

MEMORANDUM AND ORDER

This matter is before the Committee on Grievances for the Eastern District of New York (the "Committee on Grievances") to consider the imposition of reciprocal discipline against respondent pro se Roger Feinman following his disbarment by the United States District Court for the Southern District of New York. For the reasons stated below, no evi-

dentiary hearing is required. Respondent is disbarred, and his name shall be stricken from the roll of attorneys of this Court.

BACKGROUND

The following statement of facts is taken from the record of the underlying disciplinary action and from the submissions of respondent and the investigative attorney. Disputes are noted.

By order dated June 18, 1997, issued pursuant to Rule 1.5(d) of the Local Rules of the United States District for the Eastern District of New York, the Committee on Grievances designated Anthony Edward Davis, Esq. to review the allegations that led to respondent Roger Feinman's disbarment by the Southern District of New York, to advise the committee whether prosecution of a reciprocal disciplinary action was appropriate, and if so, to draft a statement of charges for service upon the respondent. Having reviewed the Southern District proceedings, Mr. Davis filed a recommendation that this Court impose reciprocal discipline upon Mr. Feinman together with a proposed statement of charges. By order dated December 3, 1998, the Committee on Grievances adopted the report and recommendation and statement of charges. Mr. Feinman was provided with a copy of the recommendation and statement of charges, to which he responded by a memorandum of law dated January 29, 1999.

Southern District Proceedings

By order dated September 29, 1995, the Committee on Grievances of the Southern District of New York (the "griev-

ance committee") received a complaint against Mr. Feinman in writing and concluded that the complaint against Mr. Feinman warranted prosecution. By order dated October 5, 1995, the grievance committee directed Mr. Feinman to show cause why discipline should not be imposed in connection with the allegations set forth in an accompanying five-count statement of charges accusing Mr. Feinman of knowingly making several false accusations against a judge and taking action which served merely to harass or maliciously injure another in violation of DR 8-102(b) and 7-102(a)(1), respectively. On November 16 and 19, 1995, Mr. Feinman submitted letters addressing the subject matter of the charges.

By letter dated January 19, 1996, the panel advised Mr. Feinman and committee counsel that it would "not be restricted to consideration of the provisions of the Code of Professional Responsibility cited in the statement of charges and notified them that the panel intended also "to consider whether Mr. Feinman's conduct violated other provisions of the code, particularly DR 7-106(c)(1) and (6). The letter gave committee counsel until February 2, 1996, to file an amended statement of charges and Mr. Feinman until February 23, 1996, to respond to the amended statement of charges.

On January 31, 1996, an amended statement of charges was submitted, which added no new substantive allegations, differing only from the initial statement of charges in that it cited additional provisions of the New York Code of Professional Responsibility, DR 7-106(c)(1) and (6). Mr. Feinman submitted an answer to the amended statement of charges on February 23, 1996.

On February 23, 1996, a second amended statement of charges was presented to the panel. The second amended statement of charges differed from the amended statement in that it added citations to DR 1-102(a)(5) and (8) to charges 1-5 and included two new charges covering statements made by Feinman not mentioned in the amended statement. By letter dated February 23, 1996, Mr. Feinman was afforded until March 15, 1996, to respond to the second amended statement of charges. Also in this letter, Mr. Feinman and committee counsel were asked to provide by March 15 "a letter that (a) identifies the witnesses they intend to call at the hearing, (b) lists the exhibits they intend to offer at the hearing and (c) sets forth their best estimate of the amount of time . . . required for presentation of their respective cases."

In a letter dated February 25, 1996, Mr. Feinman stated that he "will neither participate in, nor respond to, nor appear at any of the panel's further proceedings in this matter." In this letter, Mr. Feinman also stated that he "will not accept any future correspondence from the panel." As a result, when the panel's letter of February 23, 1996, was delivered to Mr. Feinman on February 26, 1996, it was returned with the notation, "delivery refused." On that same day, Mr. Feinman refused delivery of a Federal Express package which contained the second amended statement of charges.

The panel responded to Mr. Feinman's declarations that he refused to participate any further in the proceedings in a letter dated March 1, 1996. In that letter, the panel restated the time by which Feinman was to respond to the second amended statement of charges. In relevant part, the letter additionally stated:

> Should you refuse to participate further in these proceedings, as stated in your February 25 letter, notwithstanding being provided with notice and an opportunity to be heard, we will proceed in your absence and will render our report and recommendation to the Court with respect to the charges against you.
>
> In this regard, we note that a respondent's failure to cooperate in disciplinary proceedings, in whole or in part, may be considered in aggravation of any sanction that may be recommended by the panel and imposed by the Court.

Mr. Feinman thereafter continued to refuse to accept any communications from either the panel or committee counsel.

Mr. Feinman and committee counsel were notified by letter of March 20, 1996, that an evidentiary hearing had been scheduled for April 23, 1996, at 10:00 a.m. Mr. Feinman refused delivery of this letter, and it was returned unopened. Mr. Feinman failed to appear at the scheduled hearing. By letter dated May 2, 1996, committee counsel advised the panel of his recommendation that Mr. Feinman's name be stricken from the roll of the United States District Court for the Southern District of New York based on a seven-count statement of charges. on September 16, 1996, the panel submitted its report of Findings and Recommendations, finding that Counts One, Four, Five, a portion of Six, and Seven of the statement of charges should be sustained, and recommending that respondent be stricken from the roll of attorneys of the United States District Court for

the Southern District of New York.[2] On February 11, 1997, the Southern District accepted the panel's Findings and Recommendations, and Judge Patterson, chairman of the griev-

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[2] Count One alleged that Feinman wrote a letter dated September 19, 1994 in which he refers to "Judge Martin's crooked and corrupt decision in our case in violation of D.R. 1-102(a)(5), 1-102(a)(8), and 8-102(b). Count Four alleged that in a motion to recuse District Judge John S. Martin, Jr., in the matter of Groden v. Random House, Inc., et al., No. CV-94-1074, hereinafter, the Groden case, filed on September 1, 1994, Feinman stated that Judge Martin "is or was related by blood to, and is or was the brother of Terrence Martin with whom counsel worked . . . [who] would be aware of unfavorable and conceivably pejorative facts relating to counsel for plaintiff." Since the statement was made without the qualification that it was based on information and belief, there was no investigation as to the veracity of the statement, and the statement is false, it is in violation of D.R. 8-102(b), 7-106(c)(1), 102(a)(5), and 102(a)(8). Count Five alleged that, in a letter dated January 11, 1995, to Judge Martin, Feinman referred to his adversary in the following manner: "He either accompanies President Clinton to the Mideast as his token New York Jewboy, or takes vacation trips as he pleases, and then thinks that he can just waltz into his law school classmate's courtroom and have his every wish fulfilled." In making this statement, Feinman is charged with violating D.R. 7-102(A)(1), 7-106(c)(6), and 1-102(A)(8). The relevant portion of Count Six alleged that Mr. Feinman, referring to defendants' application to brief the issue of plaintiff's motion requesting the involuntary disqualification of Judge Martin, wrote a letter that stated: "I have elected to treat the defendants' application to brief the § 144 issue, and their submission, as ex parte. You two fellas can play with each other all you want. I've gone upstairs to speak with The Men." This statement was alleged to be in violation of D.R. 1-102(A)(8) and 7-106(C)(6). Count Seven alleged that Mr. Feinman stated in an affirmation dated October 14, 1994, that the court's opinions are "more the product of ill will than of honest intellectual inquiry," in violation of D.R. 8-102(B), 7-106(C), 1-102(A)(5), and 1-102(A)(8).

ance committee, ordered Respondent stricken from the roll of the members of the bar of that court.[3] On March 6, 1997, Feinman appealed the Southern District's decision to the Second Circuit. On July 27, 1998, the Second Circuit affirmed Judge Patterson's decision disbarring Mr. Feinman.

On December 13, 1996, this Court ordered Mr. Feinman to show cause why he should not be disciplined by this Court in light of the discipline by the Southern District. That order to show cause incorrectly stated that the Court was proceeding pursuant to Rule 4(g) based on discipline having been imposed by the Supreme Court of the State of New York, Appellate Division. In a letter dated January 14, 1997, responding to this order to show cause, Feinman notified this Court of that error and informed the Court that the Southern District's order had been vacated by order of Judge Patterson on December 13, 1996. On February 11, 1997, Feinman was again disbarred by the Southern District, and respondent submitted papers opposing reciprocal discipline by this Court in which he stated seven affirmative defenses: (1) he was denied due process in the Southern District proceeding in that he was not given notice or an opportunity to be heard; (2) there was an infirmity of proof establishing the alleged misconduct; (3) the imposition of discipline would

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[3] The Southern District initially accepted the panel's Findings and Recommendations on November 4, 1996. However, on November 23, 1996, Feinman made a motion to vacate the court's order based on a claim that he never received notice of the panel's report. As a result, the order striking Feinman from the roll of members of the bar was vacated, and respondent was ordered to show cause on January 11, 1997, why discipline should not be imposed. Thereafter, on February 11, 1997, the Southern District ordered Feinman stricken from the roll of the members of the bar of that court.

be unjust; (4) the Southern District lacked jurisdiction under Article III of the Constitution to create a hearing panel composed of members of the bar in private practice; (5) there is no judicial opinion or decision by the Southern District on which this Court could base an order of reciprocal discipline; (6) the Southern District order was procured by fraud and collusion; and (7) respondent was disabled by extreme poverty from mounting an effective defense in the Southern District proceeding. The matter was referred to this Court's Committee on Grievances, which thereafter designated Mr. Davis to investigate the allegations that led to respondent's discipline by the Southern District of New York. Mr. Davis thereafter recommended that this Court impose reciprocal discipline on Mr. Feinman.

NATURE OF SUBSTANTIVE CHARGES

All four charges for which the Southern District panel disbarred Mr. Feinman arise out of the conduct of Mr. Feinman in the course of his representation of Robert Groden in a defamation action brought in February 1994 against Random House, The New York T[4]imes, and Gerald Posner. Groden is a writer who has written extensively on the subject of the assassination of President Kennedy, arguing that there existed a broad conspiracy against President Kennedy. Groden argued that he was defamed by an advertisement placed in the New York Times for Gerald Posner's book, *Case Closed*, which stated that Mr. Groden, as well as certain other individuals who have contended that the assassination was the product of a conspiracy, were "guilty of misleading the American public."

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[4] Case Closed argues that President Kennedy was killed by Lee Harvey Oswald, acting alone.

On August 22, 1994, Judge Martin granted summary judgment in favor of the defendants in the Groden case. On September 1, 1994, Mr. Feinman filed a notice of motion on behalf of his client to "Reconsider, Reargue, Alter, Amend, Modify, Vacate, and Voluntarily Recuse" in which he made the following statement:

> The learned trial judge either is or was related by blood to, and is or was the brother of Terrence L. ("Terry") Martin, with whom counsel for Plaintiff worked in close association during the mid-1970's at CBS News. It is unknown to Plaintiff's counsel whether Mr. Martin is still living, however it is believed by counsel that Mr. Martin did not view counsel in a favorable light and that, were he still alive, he would be aware of unfavorable and conceivably pejorative facts relating to counsel for Plaintiff that would tend to denigrate the credibility of counsel in the eyes of the Court.

On September 19, 1994, prior to the determination of this motion, Mr. Feinman wrote a letter to District Judge Royce C. Lamberth of the District of Columbia. Mr. Feinman's letter, in relevant part, follows:

> The simple purpose of this letter is to create a record that I did not learn until late in the afternoon of Wednesday, September 14, 1994, that Mark Lane had instituted suit in your Court. It is my understanding that Mr. Lane's counsel was likewise unaware of the Groden litigation, until the firm of Baker & Hostetler submitted a copy of Judge Martin's

> crooked and corrupt decision in our case, to support their motion for summary judgment. . . . Mr. Davidson has already been supplied with a copy of my Notice of Motion directed at Judge Martin's serious judicial misconduct.

Copies of the letter were sent to the attorneys involved in the suit filed before Judge Lamberth, opposing counsel in the Groden case, and Judge Martin.

After denying Feinman's motion for reconsideration and recusal on September 23, 1994, Judge Martin issued an order to show cause why Feinman should not be sanctioned pursuant to Rule 11 for his unfounded accusations against the judge. On October 14, 1994, Mr. Feinman submitted an affirmation in response to Judge Martin's order which stated in relevant part that "the pervasive errors, unfounded and wholly unwarranted statements, and judicial ad hominems against plaintiff (and now his counsel) in this Court's Memorandum compel me to regretfully conclude that these opinions were more the products of ill motive than of honest intellectual inquiry." At the hearing for this order on October 21, 1994, Judge Martin did not rule with respect to the issue of Rule 11 sanctions, but instead referred the matter to the grievance committee of the Southern District.

On November 7, 1994, Mr. Feinman wrote to Judge Martin in connection with the service of papers in opposition to plaintiff's motion requesting the involuntary recusal of Judge Martin from the Groden case, stating in relevant part:

> I am rejecting service that was attempted by hand this afternoon of certain papers from

> the defendants' attorneys, and I am returning the envelope to Mr. Kovner herewith.
>
> I have elected to treat the defendants' application to brief the § 144 issue, and their submission, as ex parte. You two fellas can play with each other all you want. I've gone upstairs to speak with The Men.

On November 22, 1994, the Second Circuit denied plaintiff's petition for a writ of mandamus ordering the recusal of Judge Martin in the Groden case on November 22, 1994. Judge Martin denied the motion to recuse himself pursuant to § 144 by order dated December 2, 1994. On January 11, 1995, Mr. Feinman hand-delivered a nine-page letter to Judge Martin, with a copy to opposing counsel. In this letter, Mr. Feinman complained of a dispute that had developed with respect to the contents of the joint appendix and record of his appeal of Judge Martin's grant of summary judgment. Mr. Feinman stated:

> I am very impressed with Mr. Kovner's brazenness. He either accompanies President Clinton to the Mideast as his token New York Jewboy, or takes vacation trips as he pleases, and then thinks that he can just waltz into his law school classmate's courtroom and have his every wish fulfilled. It must be nice to have friends grant your every whim.

Upon recommending that this Court impose reciprocal discipline on Mr. Feinman, Mr. Davis' statement of charges states that "the said discipline by the United States District Court for the Southern District of New York constitutes proper and sufficient ground for reciprocal discipline of

Roger Bruce Feinman pursuant to Rule 1.5(b)(2) of the Local Civil Rules of the United States District Court for the Eastern District of New York."

DISCUSSION

Respondent has already been disciplined by the Southern District of New York.[5] Accordingly, the issue before the Court is whether it is appropriate to impose reciprocal discipline. Reciprocal discipline is a means of sanctioning attorneys for their misconduct in another forum. An attorney seeking to avoid reciprocal discipline carries a heavy burden. Under Local Civil Rule 1.5(d)(2), reciprocal discipline will be imposed

> unless the attorney concerned establishes by clear and convincing evidence (i) that there was such an infirmity of proof of misconduct by the attorney as to give rise to the clear conviction that this court could not consistent with its duty accept as final the conclusion of the other court, or (ii) that the procedure resulting in the investigation or discipline of the attorney by the other court was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process, or (iii) that the imposition of discipline by this court would result in grave injustice.

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[5] It should be noted that the Southern District's disbarment has also been the basis of reciprocal discipline barring respondent from practicing before the courts of the State of New York. *See In the Matter of Roger Bruce Feinman*, 246 A.D.2d 262, 676 N.Y.S.2d 505 (App. Div. 1998).

Respondent's submission in response to this Court's order to show cause dated December 13, 1996, stated seven affirmative defenses: (1) he was denied due process in the Southern District proceeding in that he was not given notice or an opportunity to be heard; (2) there was an infirmity of proof establishing the alleged misconduct; (3) the imposition of discipline would be unjust; (4) the Southern District lacked jurisdiction under Article III of the Constitution to create a hearing panel composed of members of the bar in private practice; (5) there is no judicial opinion or decision by the Southern District on which this Court could base an order of reciprocal discipline; (6) the Southern District order was procured by fraud and collusion; and (7) respondent was disabled by extreme poverty from mounting an effective defense in the Southern District proceeding. In response to Anthony Davis' report and statement of charges, Mr. Feinman later submitted a more detailed argument asserting that (1) the Southern District proceeding was conducted in such a manner as to violate due process and, in conjunction with that violation, was infected with fraud and collusion, and (2) the disbarment of respondent is an excessively harsh punishment.

Due Process in the Southern District Proceedings

Procedural due process is a flexible concept, and the procedures to be afforded in a proceeding depend on the type of proceeding, the interests of both the state and the attorney subject to discipline, and the risk of erroneous deprivation of the attorney's interest. *See In re Jacobs*, 44 F.3d 84, 90 (2d Cir. 1994) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). In a disciplinary case, due process requires only that respondent be given notice of the charges against him and an opportunity to be heard. *See Jacobs*, 44 F.3d at 90.

Mr. Feinman first argues that he was not given notice of or an opportunity to be heard in opposition to the Southern District's second amended statement of charges. In his submissions, Feinman admits that he sent a letter dated February 25, 1996, in which he stated that he "will neither participate in, nor respond to, nor appear at any of the panel's further proceedings in this matter." Mr. Feinman also stated that he would "not accept any future correspondence from the panel." Thereafter, Mr. Feinman returned the panel's letter of February 23, 1996 with the notation "delivery refused" and telephoned Federal Express to refuse delivery of a package they were holding for him. The Federal Express package contained a copy of the second amended statement of charges and the letter contained a time frame within which Mr. Feinman was required to submit his papers in opposition to the second amended statement of charges. Further, Mr. Feinman refused delivery of these two communications despite the fact that he knew that they related to the disciplinary proceedings against him.

Given that Mr. Feinman specifically refused delivery of the communications, the absence of service of which he now cites as a violation of due process, his complaints are unavailing. It borders on the frivolous for a party to raise a due process claim when he has "earlier attempted to thwart the very notice he complains about not receiving." *United States v. Bolton*, 781 F.2d 528, 533 (6th Cir. 1985); *see also Patmon and Young Professional Corp. v. Commissioner of Internal Revenue*, 55 F.3d 216, 218 (6th Cir. 1995) (stating that "a taxpayer should not be allowed to defeat actual notice by deliberately refusing delivery of . . . notice"); *Erhard v. Commissioner of Internal Revenue*, 87 F.3d 273, 275 (9th Cir. 1996) (refusing to countenance the party's refusal of a notice which "she held

in her hands and simply refused to open or read"). "It is well-settled that the effect of a written notice cannot be avoided by refusing service of that notice." *Reliance Insurance Co. v. Mast Construction Co.*, 159 F.3d 1311, 1318 (10th Cir. 1998).

Mr. Feinman also argues, without citation of authority, that the Southern District lacked the power to create a hearing panel composed of members of the bar in private practice "to perform adjudicative functions in original disciplinary actions instituted within that court." For that reason, Mr. Feinman argues that his disbarment in the Southern District is not entitled to "faith and credit or comity by this Court." This argument must fail because it proceeds from the fundamentally flawed premise that the panel that authored the findings and recommendations for submission to the Southern District grievance committee was the ultimate arbiter. The panel did not perform any "adjudicative functions." Instead, it was the role of the panel to "advise the committee whether prosecution of a federal disciplinary action is required" and to issue a report and recommendation to the grievance committee. *In the Matter of Friedman*, No. MC-93-0180, 1996 WL 705322, at *1 (E.D.N.Y. Nov. 26, 1996). It is the ultimate responsibility of the grievance committee, after conducting a hearing, if necessary, to arrive at a final determination.

Mr. Feinman further argues that, because there is no judicial opinion by the Southern District setting forth findings of fact and conclusions of law, "there is no intelligible basis upon which this Court may determine whether reciprocal discipline ought to be imposed." Mr. Feinman's argument, however, even to the extent that it could be construed as a due process violation, is contradicted by the plain language

of the February 11, 1997 order in which Mr. Feinman was disbarred. That order specifically accepted the findings of the panel of attorneys. Those findings included a detailed explication of the facts of Mr. Feinman's case.

Mr. Feinman also contends that the Southern District's disbarment order was obtained through fraud, deceit, and multiple false misrepresentations. Mr. Feinman's argument is based on his statement that he was never served with a copy of the second amended statement of charges, a fact that Mr. Feinman insists was known by the investigative panel to the Southern District grievance committee. Mr. Feinman states that despite this knowledge there are several statements in the findings and recommendations which state that he was served with the second amended statement of charges, thereby given notice and an opportunity to respond to the charges, and refused to avail himself of that opportunity.

Mr. Feinman further argues that the purpose of this fraud on the court was to convince the grievance committee, and later the Second Circuit on appeal, that he purposefully refused to respond to the second amended statement of charges despite notice and an opportunity to be heard. Mr. Feinman states that in making these false statements the panel sought to convince these courts of his "contempt of the disciplinary proceedings as a circumstance in addition to, or in aggravation of, his alleged professional misconduct." In reality, Mr. Feinman explains, he never received the second amended statement of charges or the letter granting him time to respond because in each case he had refused delivery.

This Court's prior discussion of the adequacy of service in this case notwithstanding, Mr. Feinman's argument that the panel's findings and recommendation contained false misrepresentations concerning service of process is belied by the statement of facts within that document. The panel's report states in a clear manner Mr. Feinman's position with respect to the Southern District's proceedings. Not only is Mr. Feinman's letter declaring his refusal to participate any further in the disciplinary proceedings reproduced in its entirety in the panel's findings and recommendation, but the procedural history section of that document also indicates each instance in which Mr. Feinman refused delivery of letters or packages. As the record presented to both the Southern District grievance committee and the Second Circuit makes no false representations concerning Mr. Feinman, Mr. Feinman's arguments are without merit.

In all events, any impression formed by the Southern District grievance committee and Second Circuit of Mr. Feinman's contempt for these disciplinary proceedings is fully supported by the record, even as Mr. Feinman would describe it. Mr. Feinman admits that he wrote a letter dated February 25, 1996, in which he stated that he would no longer participate in the Southern District's disciplinary proceedings. Thereafter, he refused delivery of each and every communication he was sent by the panel up until the date he was ordered stricken from the roll of the members of the bar of that court.

Finally, Mr. Feinman argues that because of extreme poverty he was unable to mount an effective defense. Even were such a defense available to an attorney protesting the imposition of reciprocal discipline, the record in this case fails to support such an allegation. Mr. Feinman submitted

extensive responses in the Southern District disciplinary proceeding, including one that laid out thirty-nine affirmative defenses. In fact, up until his letter of February 25, 1996, Mr. Feinman defended his positions vigorously despite his alleged impoverishment. Instead, it is patently clear to this Court that, to the extent that Mr. Feinman did not mount an effective defense to the Southern District disciplinary proceedings, the reason lies solely with his own refusal to participate in the proceedings after February 25, 1996.

Hearing

Mr. Feinman requests a hearing to present his defenses before this Court. In his prior proceedings before the Southern District, however, Mr. Feinman had ample opportunity to present evidence, despite the fact that he refused to avail himself of that opportunity at the Southern District hearing. Moreover, Mr. Feinman has failed to come forward with any new evidence on any issue or shown how, if at all, the taking of additional testimony would shed light on any of the issues before the Committee on Grievances. The risk of an erroneous deprivation of respondent's rights is low, and a full evidentiary hearing is not contemplated by the local rules or required by due process considerations. *See* Local rule 1.5(d)(1); *Jacobs*, 44 F.3d at 90-91. The hearing requested by Mr. Feinman would merely duplicate the evidence presented at the earlier court proceedings--an outcome clearly reject by the Court of Appeals. *See In re Friedman*, 51 F.3d 20 (2d Cir. 1995) (holding that the rules "do not require a hearing. Rather, they require the opportunity to be heard."). Because Mr. Feinman has admitted to the facts underlying the misconduct, he has not raised any issue requiring a hearing. *See* Local Rule 1.5(d)(1) & (4). Moreover, Mr. Feinman has had an opportunity to be heard in this proceeding. He was

appraised of the charges against him and the proposed discipline, and he then submitted a detailed response.

Infirmity of Proof

Mr. Feinman also claims that "there was such an infirmity of proof establishing the alleged misconduct as to give rise to the clear conviction that this court could not, consistent with its duties, accept as final the conclusion of the other court." While it is true that, should Mr. Feinman prove the above state of affairs by clear and convincing evidence, this Court would not impose reciprocal discipline, Mr. Feinman must do more than state the existence of his defense to carry that burden. Mr. Feinman presents no evidence in support of his statement and, in fact, admits to engaging in the conduct for which he was disbarred by the Southern District. Therefore, this Court finds that Feinman has failed to prove by clear and convincing evidence that there was any infirmity of proof whatsoever establishing the alleged misconduct in the Southern District proceeding.

Grave Injustice: Severity of Discipline Imposed

Mr. Feinman concludes by arguing that the imposition of discipline would be unjust given an extensive list of factors that this Court should weigh against imposing the most severe form of discipline, disbarment. In substance, Mr. Feinman's list of mitigating factors include nothing more than the virtue of the underlying defamation action, his full cooperation during the disciplinary proceedings, the Southern District's "discipline by ambush," and, without citing a single other case, the extent of discipline imposed for similar infractions in other cases.

As discussed supra, however, Mr. Feinman's conduct during the disciplinary proceedings exhibited anything but cooperation. In addition, the decision of the Southern District, adopting the findings and recommendations of the panel, reflects that it gave careful consideration to the severity of the penalty imposed on Mr. Feinman. In a letter dated March 1, 1996, Mr. Feinman was warned that his withdrawal from the disciplinary proceedings would be taken into account in the level of discipline imposed. In disbarring Mr. Feinman, the Southern District made particular note that it took into account Mr. Feinman's conduct during the disciplinary proceedings as an aggravating factor. The findings and recommendations submitted by the panel to the Southern District grievance committee stated that "Mr. Feinman not only failed to cooperate in connection with these proceedings, he refused to do so, openly flouting the panel and the authority of the Court to impose discipline upon him."

While Mr. Feinman argues to this Court that it has not been shown that he injured third parties, such an argument provides further evidence that Mr. Feinman continues to fail to appreciate the impact of the conduct here at issue. The conduct for which Mr. Feinman was brought before the Southern District exhibited a disdain for the legal system, and his conduct during the disciplinary proceedings repeated that pattern, regardless of Mr. Feinman's perceived societal value of his cause to reveal government conspiracy. In any event, by arguing that defects in the Southern District proceedings justify lesser discipline, Mr. Feinman seeks a review of the merits of the state proceedings that is beyond the circumscribed scope of review in reciprocal disciplinary proceedings. *See Jacobs*, 44 F.3d at 88.

CONCLUSION

Having failed to present any disputed factual issue requiring an evidentiary hearing or any legal issue concerning the constitutional sufficiency of the Southern District's disciplinary proceeding, respondent is hereby disbarred, and his name shall be stricken from the roll of attorneys.

The Clerk is directed to furnish a filed copy of the within to all parties.

Dated: Brooklyn, New York
March 18, 2000

/s/ CHARLES P. SIFTON
Charles P. Sifton, Chief Judge and Chairman of the Committee on Grievances
/s/ ARTHUR D. SPATT
Arthur D. Spatt, U.S.D.J. and Member of the Committee on Grievances
/s/ DAVID G. TRAGER
David G. Trager, U.S.D.J. and Member of the Committee on Grievances
/s/ FREDERIC BLOCK by CPS
Frederic Block, U.S.D.J. and Member of the Committee on Grievances

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
United States Court House
40 Foley Square
New York 10007

Roseann B. Mackechnie
Clerk

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of March two thousand one.

Present:
Hon. John M. Walker, Jr., Chief Judge
Hon. José A. Cabranes, CJ
Hon. Chester J. Straub, CJ
CIRCUIT JUDGES

In re: Roger B. Feinman
Docket No. 00-6900

A petition for panel rehearing having been filed herein by appellant Roger B. Feinman,
Upon consideration thereof, it is
Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By: /s/ BETH J. MEADOR
Beth J. Meador
Administrative Attorney

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

CV-96-5796 (CPS)

In the Matter of Roger Bruce Feinman, Esq., an Attorney and Counselor-at-Law. Respondent.

ORDER

Respondent's motion for reconsideration dated April 6, 2000, is denied for failure to present factual matters or controlling authority which the Court overlooked that might materially have influenced its decision. *See Pereira v. Aetna Casualty & Surety Co. (In re Payroll Express Corp.)*, 921 F. Supp. 1121, 123 (S.D.N.Y. 1996); *Violette v. Annonk Assocs., L.P.*, 823 F. Supp. 224, 226 (S.D.N.Y. 1993).

The Clerk is directed to furnish a filed copy of the within to the parties and to the Investigating Attorney.

Dated : Brooklyn, New York
April 24, 2000

/s/ CHARLES P. SIFTON
Charles P. Sifton, Chief Judge and Chairman of the Committee on Grievances

/s/ ARTHUR D. SPATT
Arthur D. Spatt, U.S.D.J. and Member of the Committee on Grievances

/s/ DAVID G. TRAGER
David G. Trager, U.S.D.J. and Member of the Committee on Grievances

/s/ FREDERIC BLOCK by CPS
Frederic Block, U.S.D.J. and Member of the Committee on Grievances

1998 U.S. App. LEXIS 18801
July 23, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the Twenty-Seventh day of July, one thousand nine hundred and ninety-eight.

PRESENT:
José A. Cabranes,
Rosemary S. Pooler,
Thomas M. Reavley, *
Circuit Judges.

In re Roger Bruce Feinman, Respondent,

Grievance Committee of the United States District Court for the Southern District of New York, Petitioner-Appellee -v.- Roger Bruce Feinman, Respondent-Appellant.

97-6064

APPEARING FOR APPELLANT: ROGER BRUCE FEINMAN, pro se, Briarwood, New York.

APPEARING FOR APPELLEE: STEVEN C. KRANE, Proskauer Rose LLP, New York, New York (Thomas D. Lynn, on the brief).

This cause came on be heard on the transcript of record from the United States District Court for the Southern District of New York (Robert P. Patterson, Jr., Judge and Chairman of the Committee on Grievances of the United States District Court for the Southern District of New York), and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and it hereby is affirmed.

Respondent Roger Bruce Feinman, an attorney, appeals from an order entered by the district court at the recommendation of its six-judge Committee on Grievances (the "Committee"), striking his name from the roll of attorneys admitted to practice before that court. On appeal, he contends principally that (1) the Committee violated his right to due process by appointing a panel of attorneys admitted to practice before the district court to assist in fact-finding; (2) the order does not contain sufficient findings of fact and conclusions of law to allow for meaningful appellate review; and (3) the Committee failed to meet its burden of proof to sustain the charges.

These charges arose out of Feinman's behavior while representing the plaintiff in the case of *Groden v. Random House, Inc.*, 61 F.3d 1045, before Judge Martin.[1] When Judge Martin dismissed the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), Feinman wrote a letter to Judge Royce Lamberth of the United States District Court for the District of Columbia, criticizing Judge Martin's opinion as "crooked and corrupt." Feinman also made a post-judgment motion for Judge Martin's involuntary recusal, accusing him in an attached affidavit of bias based on close professional and personal ties with the defendant's counsel and based on an allegation that he was the brother of a former co-worker of Feinman. None of these allegations was substantiated. Finally, Feinman wrote a letter to Judge Martin in which he called his adversary in the Groden case President Clinton's "token New York Jewboy."

The Committee appointed a panel of attorneys to assist with fact-finding, pursuant to its then Local Rule 4(a). Feinman made requests for document discovery in an effort to prove the truth about his allegations of bias; the Committee denied the requests. Feinman then refused to cooperate any further in the proceedings, even refusing to attend the hearing held by the advisory panel. When the panel found Feinman guilty of violating various provisions of the Disciplinary Rules of Conduct, and the Committee ordered him disbarred, Feinman appealed.

We review a district court's imposition of discipline against an attorney for clear abuse of discretion. *In re Gouiran*, 58 F.3d 54, 56 (2d Cir. 1995), *quoting In re Jacobs*, 44 F.3d 84, 88 (2d Cir. 1994). There is nothing in the record be-

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[1] For a full discussion of the facts and issues pertaining to that case, *see Groden v. Random House., Inc.*, 61 F.3d 1045 (2d Cir. 1995).

fore this Court to support a conclusion that any such abuse of discretion occurred. The appointment and use of an advisory panel of attorneys is clearly authorized by the Southern District's Local Rules, both as then in effect (as Rule 4(a)) and as currently in effect (as Rule 1.5(a)), and does not violate the requirements of due process. The order appealed from, while brief, clearly indicates the basis for its decision and specifically adopts the reasoning of the advisory panel; the basis and justification for the imposition of discipline was thereby made clear for this Court. *See In re Gouiran*, 58 F.3d 54, 58 (2d Cir. 1995). Finally, the record is replete with evidence to support the charges, and Feinman does not dispute that he made the statements and allegations at issue. The Committee therefore clearly met its burden of proof with regard to the charges.

We have considered Feinman's remaining contentions and find them to be without merit.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT,
Carolyn Clark Campbell, Clerk

By: /s/ RALPH A. ANDERSON
Ralph A. Anderson
Acting Operations Manager

* Of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

Rule 4. Discipline of Attorneys

(a) The chief judge shall appoint a committee of the board of Judges known as the committee on grievances. which under the direction of the chief judge shall have charge of all matters relating to discipline of attorneys. The commIttee on grievances may entertain complaints in writing from any source. Complaints, and any files based on them, shall be treated as confidential. The chief judge shall appoint a committee of attorneys who are members of the bar of this court to advise or assist the committee on grievances. Members of this committee will investigate complaints, and will serve as members of hearing panels.

(b) If it appears. after notice and opportunity to be heard, that any member of the bar of this court has been convicted of a felony in any federal court. or in the court of any state. territory. district, commonwealth or posesslon, the member's name shall be struck from the roll of members of the bar of this court.

(c) If it appears. after notice and opportunity to be heard, that any member of this court has been convicted of a misdemeanor, in any federal court or in the court of any state, territory, district, commonwealth or possession, the member may be disciplined by this court in accordance with the provisions of paragraph (g).

(d) If it appears. after notice and opportunity to be heard, that any member of the bar of this court has been disciplined by any federal court or by the eourt of any state, territory, district. commonwealth or possession, the member may be disciplined by this court in accordance with the provisions of paragraph (g).

(e) If it appears. after notice and opportunity to be heard, that any member of the bar of this court has resigned from the bar of any federal court or the court of any state, terri-

tory. district, commonwealth or possession while an investigation into allegations of misconduct by the attorney were pending, the member may be disciplined by this court, in accordance with the provisions of paragraph (g).

(f) If, in connection with activities in this court. any attorney is found guilty by clear and convincing evidence, after notice and opportunity to be heard, of conduct violative of the Codes of Professlonal Responsibility of the American Bar Association or the New York Bar Association from time to time in force, the attorney may be disciplined by this court, in accordance with the provisions of paragraph (g).

(g) Discipline imposed pursuant to paragraphs (c), (d), (e) or (f) may consist of suspension or censure. In the case of an attorney who is a member of the bar of this court. It may also consist of striking the name of the attorney from the roll. In the case of an attorney admitted pro hac vice, it may also consist of precluding the attorney from again appearing at the bar of this court. Upon the entry of an order of preclusion, the clerk shall transmit to the court or courts where the attorney was admitted to practice a certified copy of the order. and of the court's opinion, if any.

Discipline may be imposed by this court with respect to paragraphs (d) and (e) unless the member of the bar concerned establishes by clear and convincing evidence: (1) with respect to paragraph (d) that there was such an infirmity of proof of misconduct by the attorney as to give rise to the clear conviction that this court could not consistently with its duty accept as final the concluslon of the other court; or (2) that the procedure resulting in the investigatmn or discipline of the attorney by the other court was so lacking in notice or opportumty to be heard as to constitute a deprivation of due process; or (3) that the imposition of discipline of this court would result a grave injustice.

(h) If it appears. after notice and opporturuty to be heard. that any lawyer not a member of the bar of this court has appeared at the bar of this court without permission to do so, said lawyer mav be precluded from again appearing at the bar of this court. Upon the entry of an order of preclusion. the clerk shall transmit to the court or courts where the attornev was admitted to practice a certified copy of the order. and of the court's opinion, if any.

(i) Complaints in writing alleging that any member of the bar of this court is in a category described in paragraphs (b) through (e). or that any attorney practicing In this court has committed the misconduct referred to in paragrnph (f), will be directed to the chief judge. who shall refer such complaints to the committee on grievances. which may designate an attorney selected from the panel of attorneys to investigate the allegations if it deems investigation necessary or warranted. If, with or without investigation, the committee on grievances deems that the charges require prosecution, a statement of charges shall be served on the attorney concerned topether with an order to show cause why discipline should not be imposed. Upon the respondent attorney's answer to the charges the matter will be scheduled for a prompt hearing before a panel of attorneys which will report findings and recommendations.. After such a hearing and report, or if no timely answer is made by the respondent attorney or if the answer raises no issue requiring a hearing, such action shall be taken as justice and this rule may require.

(j) Any attorney who has been suspended or whose name has been struck rrom the roll of the members of the bar of this court may apply in writing to the chief judge, for good cause shown, for the lifting of suspension or for reinstatement to the rolls. The committee on grievances shall act upon the application, either immediately or after receiving

findmgs and recommendations from a heanng panel of attorneys to which the applicatibn has been referred.

(k) Misconduct of any attorney in the presence of this Court or in any manner in respect to any matter pending in thls court may be dealt with dlrectly by the judge in charge of the matter or at said judge's option referred to the commntee on grievances, or both.

(l) Whenever It appears that an attorney admitted to practice in the court of any state, territory, district, commonwealth or possession, or in any other federal court, has in this court been convicted ot any crime or disbarred, suspended or censured the clerk shall send to such other court or courts a certified copy of the judgment of conviction or order of disbarment, suspension or censure. and a statement of the attorney's last known office and resident address.

[HEARING PANEL EXHIBIT 8]

MEMORANDUM

TO: Judge Patterson
Chair, Grievance Committee
FROM: Judge Martin
DATE: September 27, 1994
RE: Roger Bruce Feinman

I am sending you herewith a copy of my opinion in Groden v. Random House, et al. In the course of the proceedings following my grant of summary judgment to the defendant, it came to my attention that plaintiff's counsel had sent a letter to a judge handling a related case in which he made reference to "Judge Martin's crooked and corrupt decision." In view of the fact that such a comment may violate DR 8-102(b) of the Code of Professional Responsibility, I felt this matter should be brought to your attention.

/s/JOHN S. MARTIN, JR.
John S. Martin, Jr.

copies to:
Judge Kram
Judge Sotomayor
Judge Stanton

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of
ROGER BRUCE FEINMAN
Respondent
M-2-238
ORDER

The Committee on Grievances of this Court, having entertained a complaint in writing, pursuant to Rule 4 of the General Rules of this Court, against the above-named respondent, a member of the bar of this Court, and having concluded that the charges against respondent require prosecution, hereby appoint

STEVEN KRANE, Esq., VICTORIA SCHONFELD, Esq., and ALAN LEVINE, Esq. to a panel to hear the issues raised by any such charges made by JOHN GROSS, Esq. who has heretofore been designated to serve upon the said respondent a written statement of the charges against him, and any answer thereto, and to report thereon in writing to the Committee on Grievances.
SO ORDERED.

/s/ROBERT P. PATTERSON, JR.
ROBERT P. PATTERSON, JR.
Chairman, Grievance Committee S.D.N.Y.
Dated: New York, New York
September 29, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of
ROGER BRUCE FEINMAN
Respondent
M-2-238
ORDER

Pursuant to General Rule 4(i), because the Committee on Grievances has found that charges of professional misconduct made against respondent Roger Bruce Feinman require prosecution,

Let the respondent attorney show cause why discipline should not be imposed pursuant to General Rule 4(g) of this Court. Rule 4(g) provides that discipline may consist of censure, suspension or striking the name of the attorney from the roll of the Court. Any submission should respond to the attached statement of charges, should be in writing, and addressed to the panel of attorneys appointed to hear the charges against the respondent. The panel is chaired by Steven Krane, Esq., of Proskauer Rose Goetz & Mendelsohn, 1585 Broadway, New York, New York 10036. Also serving on the panel are Victoria Schonfeld, Esq., of Mitchell Hutchins Asset Management, 1285 Avenue of the Americas, New York, New York 10019; and Alan Levine, Esq., of Kronish, Lieb, Weiner, & Hellman, 1114 Avenue of the Americas, New York, New York 10036.

This submission should be received no later than November 16, 1995.

SO ORDERED

/s/ROBERT P. PATTERSON, JR.
ROBERT P. PATTERSON, JR.

Chairman, Grievance Committee S.D.N.Y.
Dated: New York, New York
October 20, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of
ROGER BRUCE FEINMAN
Respondent

STATEMENT OF CHARGES

Pursuant to Rule 4 of the General Rules of the United States District Court for the Southern District of New York, and the letter of the Honorable Robert P. Patterson, Jr., United States District Judge, and Chairman, Committee on Grievances, dated October 5, 1994, requesting charges to be prepared, the following charges are stated against Roger Bruce Feinman:

1. On or about September 19, 1994, Roger Bruce Feinman wrote a letter to District Judge Royce C. Lamberth of the United States District Court of the District of Columbia in which he refers to "Judge Martin's crooked and corrupt decision in our case"; in violation of D.R. 8-102(b) of the Code of Professional Responsibility, which prohibits the making of false accusations against a judge or adjudicatory officer."

2. In or around September 1994, Roger Bruce Feinman made a motion to recuse District Judge John S. Martin, Jr. of the Southern District of New York in the matter of Robert Groden v. Random House, Inc., et al., Index No. 94 Civ. 1074

(JSM), in which he stated that Judge Martin's rulings may be affected by the fact that he had held positions in the Department of Justice which were "co-extensive" with "two material witnesses whom plaintiff wishes to call." However, since counsel did not identify these two witnesses and asserted no other basis for his argument that these factors might influence Judge Martin's judgment, these statements were made in violation of D.R. 8- 102(b) of the Code of Professional Responsibility, which prohibits the making of "false accusations against a judge or adjudicatory officer."

3. In or around September 1994, Roger Bruce Feinman made a motion to recuse District Judge John S. Martin, Jr. of the Southern District of New York in the matter of Robert Groden v. Random House. Inc., et al., Index No. 94 Civ. 1074 (JSM), in which he stated that Judge Martin's rulings may be affected by the fact that in the past he was professionally associated with Lesley Oelsner, Associate General Counsel for defendant Random House, Inc. However, since counsel made no attempt to ascertain what current relationship, if any, existed between Judge Martin and Ms. Oelsner, and in fact failed to ascertain that Judge Martin and Ms. Oelsner maintain neither a social or professional relationship, these statements were made in violation of D.R. 8- 102(b) of the Code of Professional Responsibility, which prohibits the making of "false accusations against a judge or adjudicatory officer.

4. In or around September 1994, Roger Bruce Feinman made a motion to recuse District Judge John S. Martin, Jr. of the Southern District of New York in the matter of Robert Groden v. Random House. Inc., et al., Index No. 94 Civ. 1074 (JSM), in which he stated that Judge Martin "is or was related by blood to, and is or was the brother of Terrence L.

("Terry") Martin with whom counsel worked . . . [who] would be aware of unfavorable and conceivably pejorative facts relating to counsel for plaintiff." However, since this factual assertion was made without any qualification by an allegation that it was based on information and belief, and apparently there was no attempt to investigate the veracity of this statement, and, in fact, this statement is not true, this statement was made in violation of D.R. 8-102(b) of the Code of Professional Responsibility, which prohibits the making of "false accusations against a judge or adjudicatory officer."

5. In a letter dated January 11, 1995, to District Judge John S. Martin, Jr. of the Southern District of New York in connection with the matter of Robert Groden v. Random House, Inc., et al., Index No. 94 Civ. 1074 (JSM), opposing defendant's request to augment the record on appeal, counsel referred to his adversary, Victor Kovner, in the following manner: "[h]e either accompanies President Clinton to the Mideast as his token New York Jewboy, or takes vacation trips as he pleases, and then thinks that he can just waltz into his law school classmate's courtroom and have his every wish fulfilled." This statement was made in violation of D.R. 7-102(A)(l) of the Code of Professional Responsibility, which prohibits the assertion of positions "when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

Dated: New York, New York
August 28, 1995

/s/ JOHN H. Gross
John H. Gross

[HEARING PANEL EXHIBIT 17]

142- 10 Hoover Avenue
Apartment 404
Briarwood, New York 11435

January 22, 1996

Steven C. Krane, Esq.
Proskauer Rose Goetz & Mendelsohn
1585 Broadway
New York, New York 10036

Re: Matter of Roger Bruce Feinman
Ref. No. M-2-238

Dear Mr. Krane:

I have your letter dated January 19, 1996. For the record, I am reserving my right to object to any expansion of the Statement of Charges, besides offering whatever substantive response may be required. However, I shall await receipt of the amendment before formalizing this objection. Since there may be other exceptions taken with these proceedings, and other matters preliminary to the conduct of a hearing, I have diaried the dates mentioned in your letter as control dates.

At this time, I request the advice of the panel (and, by a copy of this letter, the District Court Executive) whether, besides General Rule 4(g) of the United States District Court for the Southern District of New York, the panel and/or the Grievance Committee subscribes to any protocol for the

general conduct of these proceedings, also the hearing itself, and whether I may obtain a copy.

I further request whether the panel is aware of any legal matters in which they or any member of their firms are involved that are active or pending before any member of the Grievance Committee of the Court or The Hon. John S. Martin, Jr. In the case of Ms. Schonfeld, this would include her company and any parent or affiliate.

In the case of Mr. Levine, I also request the panel's advice whether his employment as Assistant United States Attorney for the Southern District of New York overlapped or coincided with Judge Martin's tenure as U.S. Attorney, and whether as a result of his employment he formed any professional association or acquaintance with Lesley Oelsner, Esq.

Very truly yours,
/s/Roger B. Feinman
ROGER BRUCE FEINMAN

cc.: Alan Levine, Esq.
Victoria Schonfeld, Esq.
John H. Gross, Esq.
Jean Joyce

[HEARING PANEL EXHIBIT 18]

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MEMBER OF THE FIRM
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EUROPEAN COUNSEL:
DUBARRY LEVEOUE
LE DOUARIN & VEIL
PARIS-BRUSSELS

February 2, 1996

Roger Bruce Feinman, Esq.
142-10 Hoover Avenue
Apartment 404
Briarwood, New York 11435

Re: Matter of Feinman

Dear Mr. Feinman:

The panel responds to your letter of January 22, 1996 as follows:

1. General Rule 4(f) of the Southern District of New York provides that discipline may be imposed upon an attorney who is "found guilty by clear and convincing evidence, after notice and opportunity to be heard, of conduct violative of the Codes of Professional Responsibility of the American Bar Association or the New York Bar Association from time to time in force . . . ." The proceedings in this matter are be-

ing conducted within this framework. From time to time, as questions arise on procedural issues, the panel as it deems appropriate may look to the rules for the conduct of proceedings before the Departmental Disciplinary Committee of the Appellate Division, First Judicial Department (22 N.Y.C.R.R. Sec. 605.13) for guidance.

2. Like all New York City law firms with substantial federal litigation practices, both Mr. Levine's firm and my firm from time to time represent clients in litigations assigned to Judge Martin and members of the Grievance Committee of the Southern District of New York. Likewise, as would be the case with any other significant business headquartered in New York, Ms. Schonfeld's company and/or its affiliates may have been, may currently be, or may in the future be involved in litigated matters assigned to Judge Martin or members of the Grievance Committee.

3. Mr. Levine served as an Assistant United States Attorney under John Martin for approximately 60 days during the spring of 1980. Although Mr. Levine's tenure at the U.S. Attorney's Office similarly overlapped with that of Lesley Oeisner, Esq., he did not form any professional or social relationship with her.

Yours very truly,
/s/ Stevem C. Krane
Steven C. Krane

cc: John H. Gross
Alan Levine
Victoria Schonfeld
Jean Joyce

[HEARING PANEL EXHIBIT 28]

142- 10 Hoover Avenue
Apartment 404
Briarwood, New York 11435
February 25, 1996

Stephen C. Krane, Esq.
Proskauer Rose Goetz & Mendelsohn
1585 Broadway
New York, New York 10036-8299

Re: Matter of Roger Bruce Feinman
Ref. No. M-2-238

Dear Mr. Krane:

You should have my Answer to the Amended Statement of Charges. I will neither participate in, nor respond to, nor appear at any of the panel's further proceedings in this matter. I will not accept any future correspondence from the panel.

Besides the amendments to the original Statement of Charges, these entire proceedings violate my constitutional rights and are otherwise unlawful. Accordingly, there is no valid obligation on my part to continue participating in the panel phase of this matter.

Very truly yours,
/s/ Roger B. Feinman
Roger Bruce Feinman

cc.: Alan Levine, Esq.
Victoria Schonfeld, Esq.
Jean Joyce

[HEARING PANEL EXHIBIT 36]

ANDERSON KILL OLICK & OSHINSKY, P.C.
Attorneys and Counsellors at Law

JOHN H. GROSS
(212) 278- 1000
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May 2, 1996

Steven C. Krane, Esq.
Proskauer Rose Goetz & Mendelsohn LLP
1585 Broadway
New York, NY 10036-8299

Re: In the Matter of Roger Bruce Feinman. Resnondent

Dear Mr. Krane:

Petitioner recommends that Mr. Feinman's name be stricken from the roles of the United States District Court for the Southern District of New.York, subject to his right to reapply upon whatever showing is required by the Committee on Grievances.

Very truly yours,
/s/JOHN H. GROSS
John H. Gross

JHG:lar
cc: Roger Bruce Feinman
Alan Levine
Victoria Schonfeld